Met West Agribusiness, Inc. *and* Distillery, Wine & Allied Workers Division, Local 45D, United Food and Commercial Workers International Union, AFL–CIO, CLC. Cases 32–CA–16313, 32–CA–16425, and 32–RC–4332

May 23, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On July 7, 1998, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party-Petitioner filed an opposition brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt his recommended Order as modified below.

Our dissenting colleague would reverse the judge's finding that the Respondent violated Section 8(a)(1) by telling an employee that a previously promised wage increase could not be granted because the Union had filed a petition for an election.

There is no dispute that such a statement was made by the Respondent's labor consultant, Jose Ybarra. On the other hand, the record does not establish whether, in fact, the wage increase had been promised. Ybarra himself was unable to confirm that a promise had been made.[2] This uncertainty is immaterial, however, since the violation is not the denial of the raise itself, but rather Ybarra's statement.

Our colleague sees Ybarra's statement as simply an "honest and lawful explanation" of the Respondent's decision not to grant the raise, in light of perceived legal constraints. That view might be correct if Ybarra had said that the raise could not be granted since it had not been promised or since no promise could be adequately proved. But Ybarra did not say that, nor did he explain that the Respondent was acting to avoid the appearance of election interference. Instead, Ybarra simply told the employee that he was not getting the raise because of the union campaign. Whether or not the raise had been promised, and whether or not it could have been granted lawfully, Ybarra's statement placing the onus on the Union for denying a wage increase clearly violated the Act. *American Commercial Bank*, 226 NLRB 1130, 1132 (1976). Accordingly we adopt the judge's finding of violation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Met West Agribusiness, Inc., Del Rey, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following as the final paragraph of the Order.

"IT IS FURTHER ORDERED that the election is set aside and Case 32–RC–4332 is severed from Cases 32–CA–16313 and 32–CA–16425 and remanded to the Regional Director for Region 32 for the purpose of conducting a second election."

CHAIRMAN HURTGEN, dissenting in part.

I agree with my colleagues except as set forth below.

I do not agree that the Respondent acted unlawfully when its agent, Jose Ybarra, told an employee that the Respondent could not grant him an increase because of the pending petition. The evidence does not establish that, prior to the campaign, the employee had been promised the increase.[1] If there had been such a promise, the Respondent would have been required to carry through on the promise, notwithstanding the petition.[2] However, since there was no such promise, a grant of the benefit in the face of the petition would likely have been unlawful.[3] Thus, the Respondent decided not to grant the benefit. And, the Respondent correctly explained that it could not grant the benefit because of the petition. I fail to see how an honest and lawful explanation can be unlawful.

Contrary to the contention of my colleagues, the Respondent's consultant, Ybarra, did not say that the employee would not get a raise because of the Union.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The record shows that after meeting with a group of employees, Ybarra spoke individually with an employee who was concerned about not having received a wage increase that had been promised him some months earlier by the Respondent's former plant manager, John Leon. Because Leon was no longer employed by the Respondent, Ybarra told the employee that he would check with Respondent's facilities manager, Russell Thorton, and get back to him. Thorton was unable to confirm whether or not a promise of a raise had been made. Ybarra thereafter advised the employee that he had spoken with Thorton and that "at this time he could not do anything now that there was a petition for an election."

[1] There is only hearsay evidence of such a promise.

[2] *Atlantic Forest Products*, 282 NLRB 855, 858 (1987).

[3] *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964).

Rather, Ybarra explained to the employee that he (Ybarra) could not give the raise because of the petition. And, he said that he could not give the raise "now." Thus, the Respondent's statement was *not* that the wage increase was being denied in retaliation against the Union.

George Velastegui, Esq., for the General Counsel.
Jordan L. Bloom and *Spencer H. Hipp, Esqs. (Littler Mendelsohn)*, of San Francisco and Fresno, California, for the Respondent-Employer.
Elaine M. Yama, Esq. (Bennett, Sharpe & Weiland), of Fresno, California, for the Union-Petitioner.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Fresno, California, on March 24 and 25, 1998. On August 28, 1997, Distillery, Wine & Allied Workers Division, Local 45D, United Food and Commercial Workers International Union, AFL–CIO, CLC (the Union) filed the charge in Case 32–CA–16313 alleging that Met West Agribusiness, Inc. (Respondent or the Employer) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The Union filed an additional charge in Case 32–CA–16425 on October 21, 1997. On December 9, 1997, the Regional Director for Region 32 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(3) and (1) of the Act. On March 9, 1998, the Regional Director issued an amended consolidated complaint. Respondent filed timely answers to the complaints, denying all wrongdoing.

On July 17, 1997, the Union filed a petition in Case 32–RC–4332 seeking to represent Respondent's employees in its juice plant. An election was held on September 4, 1997. The results of the election were 18 votes cast for representation by the Union and 33 votes against representation. There were also seven challenged ballots. The Union filed timely objections to the election. On December 11, 1997, the Regional Director issued a report and recommendations on objections, order consolidating cases and notice of hearing. The hearing on the Union's objections was consolidated with the unfair labor practices hearing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURSDICTION

Respondent is a Delaware corporation with offices and a principal place of business located in Del Rey, California, where it is engaged in the manufacture and sale of juice products. On December 22, 1997, Respondent's name was changed to "Sun Met Agricultural, Inc." as a result of the sale of the Company. David Sasaki, Respondent's president and CEO, is now president and CEO of Sun Met Agricultural. During the 12 months prior to the issuance of the complaint, Respondent sold and shipped products valued in excess of $50,000 directly to customers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Alleged Unlawful Statements

The Union began its organizing campaign in May 1997 by collecting union authorization cards from employees in the juice plant and by distributing union buttons to employees. Employee Robert Perez was one of the first employees to distribute and wear union buttons to work. Perez also solicited other employees to sign union authorization cards. Respondent became aware of the union activity in late May or early June. Perez testified that John Leon, Respondent's plant manager until July 1, 1997, directed Perez to remove his union button at work. As will be discussed below, the General Counsel contends that Respondent suspended Perez because of his union activities.

In mid-June, Leon spoke to employees Steve Dayton, Shelby None, Jose Juizorra, Eric Guerra, and approximately two to four other employees in Respondent's lunchroom. Dayton testified that Leon told Guerra that if Respondent "thought that the Union was going to come in, Respondent could do just about anything to prevent the union from coming in." Leon said Respondent could lay off employees without notice and could lower employees wages to the minimum wage. Further, Leon stated that Respondent could even close the Company to keep the Union out. During this conversation Guerra raised the subject of a written warning that he had received. Leon asked Bob Skinner, a supervisor in charge of waste water, to retrieve Guerra's written warning and stated that he (Leon) would be willing to tear up the warning. Dayton testified that Skinner did return with a document and Leon asked whether Guerra wanted Leon to tear up the warning. Guerra said, "no, that's not the point." Leon asked if the employees wanted a meeting with management "to get these problems worked out." Dayton answered that he didn't believe there was any need to discuss it further.

On July 1, Leon was "released" by Respondent. The position of plant manager was eliminated and Tim Ramirez was appointed lead supervisor.

In mid-July, Respondent hired Jose Ybarra, a labor consultant, to conduct employer-employee meetings and to report the employees' concerns to management. On July 22, 1997, Ybarra

[1] The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

held four meetings with groups of employees and asked employees to express their concerns or to make suggestions which he said he would convey to management. During these meetings, employees complained about various issues including a failure to receive wage increases. Following these meetings, Ybarra reduced the employees' comments to a written report which he presented to David Sasaki, Respondent's president. One of the concerns listed in the written report was a desire by employees to be represented by a "neutral third party."

On July 17, the Union filed the representation petition. Respondent received notice of the petition on July 23. Steve Dayton testified, that on or about July 17, he had a conversation with Sasaki in which Sasaki told Dayton that he was trying to "clean up" the employees' complaints about not receiving wages. According to Dayton, Sasaki told Dayton that if the Union got into the Company, Dayton would really be "screwed." According to Dayton, Sasaki stated that a union could not negotiate wages and wage increases with Respondent. Sasaki asked Dayton whether Dayton believed that things were getting better at the Company and Dayton replied that he thought that nothing had changed.

Sasaki testified that shortly after July 14, he observed Dayton and thanked Dayton for a statement the employee had signed on July 14 regarding John Leon. Sasaki mentioned that two or three employees "had fallen through the cracks" and had not received wage increases. Dayton stated that it was more than two or three and Leon said he would look into the matter. Sasaki said he would look at Dayton's personnel file and although he did not always say "yes," he did believe he was fair. Both Sasaki and Dayton testified that Sasaki made no promise of a wage increase. Sasaki did not, in fact, review Dayton's personnel file because Sasaki received notice of the representation petition shortly after this conversation.

I found both Dayton and Sasaki to be sincere witnesses. However, I believe that Sasaki's account of the conversation is probably more accurate. I do not believe that Sasaki told Dayton that a union could not negotiate wages or wage increases. Further, I do not believe that Sasaki stated that Dayton would be screwed if there were a union at the Company. I conclude that Dayton's testimony is based on his impressions rather than statements verbalized by Sasaki. Further, I found Dayton's testimony regarding meetings held in August and September, to be inaccurate. Accordingly, I make my findings based on the credited testimony of Sasaki.

On or about August 8, Respondent hired Russell Brown, a labor consultant, to manage its representation election campaign. Ybarra continued to work with Respondent but Brown took the lead in conducting the campaign. Brown held meetings with Respondent's employees on August 19 and 26, and on September 2, 1997. Brown showed the employees videos. At one of the meetings on August 19, an employee asked whether it was illegal to show videos before an election. Brown responded that the videos had been purchased from a reputable company and had been used throughout the nation in many representation campaigns. Brown further stated that he was not aware of any objections having been filed to the use of these videos and that he knew of no instance where the NLRB had held these videos to be objectionable. I do not find any credible evidence that Brown suggested that the NLRB had approved the message being communicated by the videos. Further, I do not credit any testimony to the effect that Brown stated the videos had been approved by the NLRB. I believe Brown's version of his statements regarding the videos to be more reliable than that of employees Perez and Dayton. The parties stipulated that the contents of the videos are not in issue and that nothing contained in the videos is alleged as objectionable conduct. I do not credit any of the testimony that suggests that Brown held himself out as a former Board Member or judge. Rather, Brown, a labor consultant for the past 15 years, was introduced as an experienced labor consultant who had formerly worked as a Board agent. Brown had, in fact, worked for the Board prior to setting up his consulting business.

In mid-August Tim Ramirez, Respondent's lead supervisor, asked Robert Perez to speak with Ybarra. Perez met with Ramirez and Ybarra in one of Respondent's offices. In this meeting, Ybarra told Perez that the employees did not need the Union and that Ybarra could help the employees resolve their problems without the Union. Ybarra asked Perez if he had any problems he wished to discuss and Perez answered that he had received "bogus" warnings. Ybarra promised to look at the warnings with management and see if he could "fix" the problems. Ybarra said that the Union was not a good idea and that the employees "should let it drop." Ybarra said that he had learned from Ramirez that Perez had influence with the other employees and that employees would listen to Perez. Ybarra then asked Perez to try and convince other employees "that the Union was not the answer."

Ybarra denies that he made the statements attributed to him by Perez. However, he did admit to discussing employee concerns with employees. On these occasions, Ybarra asked employees to discuss their work concerns and promised to convey the employees' comments to management. Ybarra admitted that he discussed the election with Perez and that he told Perez that Respondent wanted Perez' support. Ramirez testified at the hearing but was not questioned, and did not testify regarding this conversation. Because there was no explanation for the failure to question Ramirez about this conversation, I have drawn an adverse inference from the failure of Ramirez to testify as to Ybarra's remarks to Perez.[2] Accordingly, I credit Perez' testimony over Ybarra's denials.

On September 2, Respondent had mandatory meetings with employees at which videos concerning strikes were shown. Employees asked Sasaki about the rumored sale of the Company. Sasaki answered that the Company was up for sale but that a buyer had not yet been identified. Sasaki said that when the Company was sold that he would have to apply for a job. He said that he would recommend that any buyer retain Respondent's employees.[3] Sasaki stated that having the representation election pending while trying to sell the Company was not good for the Company. He said he had not discussed the election with any prospective buyer. Sasaki opined that if Respondent was successful in the election, the matter would become moot. An employee asked if the plant would close and Sasaki answered,

[2] *Property Resources Corp*., 285 NLRB 1105 fn. 2 (1987); and *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988).

[3] After the sale to Sun Met Agricultural, all employees were retained.

"no." Sasaki stated that it would make no sense to close the juice plant since it was a new plant. I do not credit any evidence that suggests Sasaki threatened to close the plant or that the new buyers would close the plant.

Robert Perez testified that on September 2, Ybarra approached him after an employee meeting. According to Perez, Ybarra asked him whether he had talked to any of the other employees about the union election. Perez responded that he had not. Ybarra asked Perez to talk to the employees that night since the election was imminent. Perez replied that he would try.

B. The Suspension of Robert Perez

At the September 4 election, Perez served as an observer for the Union. Perez testified that on September 8, the next day that he worked with Ramirez, Ramirez told him that David Sasaki was upset and disappointed with Perez because Perez had been the union observer. Ramirez told Perez that the employee no longer had any "pull with Sasaki" and that one more little mistake and Perez would be fired. Perez did not respond but returned to work. Ramirez credibly denied making such statements.

On September 9, Perez was late because of alleged car problems. Perez told Ramirez of his car problems and that Perez' wife had driven him to work. Ramirez told Perez to go to work. According to Perez, the next day he asked what Ramirez intended to do about the tardiness and Ramirez answered that Perez should "forget about it." Perez was not issued any disciplinary notice on this occasion. Ramirez was directed by Russell Thorton, facilities manager, to prepare a warning notice for this incident but not to issue it. However, on October 10, Perez was again late for work.

According to Perez, on October 10, Perez called Supervisor Richard Marin at 6:40 a.m., 40 minutes after his scheduled starting time, and said he had overslept and would be into work in 5 or 10 minutes. Marin directed Perez to stay at home for the rest of the day and to call in about 9 a.m. that morning to speak with Ramirez.[4] Marin had called Perez' home 15 minutes earlier but received no answer. At approximately 7:05 a.m., Perez again called the plant and spoke to Joe Llanos, a security guard employed by an outside security service. Perez told Llanos that he would be late because of car problems. Llanos told Perez that Llanos had been instructed not to allow Perez to come to work that day. Llanos made a note of this conversation and then telephoned Barbarajean Garcia, a secretary in the personnel office, and informed Garcia of Perez' call. Perez called the plant again at 8:40 a.m. and spoke with Garcia. Perez told Garcia that he had car trouble and asked to speak with Tim Ramirez. Garcia told Perez that Ramirez would not be at work that day and asked whether Perez wished to speak with Larry Isonio, production manager, or someone in the personnel office. Perez said that he would not but asked Garcia to be sure to write down that he had been directed not to come to work that day by Marin.

That same date, Marin wrote a memorandum regarding Perez' lateness and absence. Also on October 10, Sylvia Fabela, Respondent's personnel coordinator, prepared a memorandum regarding Perez' lateness and absence because she would be on vacation on the following Monday, October 13. One of Fabela's recommendations was to suspend Perez 3 days pending a decision on discipline. Russell Thorton, Respondent's facilities manager, approved this recommendation and had Fabela call Perez. Thus, on the afternoon of October 10, Fabela notified Perez that Perez was suspended for 3 days. In fact Perez was scheduled for off days on October 12 and 13. Thus, he lost work for only 2 days, Friday, October 10 and Saturday, October 11.

On the following Monday, October 13, Marin gave Ramirez his memorandum regarding Perez' lateness on October 10. After speaking with Marin and Garcia, Ramirez wrote his own memorandum regarding Perez' conduct of October 10. On Tuesday, October 14, Sondra Clark, human resource director,[5] and Larry Oceanic, production manager, met with Perez in Clark's office. Clark gave Perez a warning notice prepared by Ramirez. Clark told Perez that this would be a final warning. Clark asked Perez to sign the warning notice but Perez refused to do so. Perez instead wrote that he refused to sign the notice and initialed his comment. Perez worked that day on a shift which began at 2 p.m.

Perez continued to work for Respondent until the end of the juice plant season in December 1997. This hearing took place during the off season. Perez, along with the other juice plant employees, was expected to be recalled in June1998, at the commencement of the 1998 juice plant season.

C. Respondent's Defense

Respondent, in its defense, presented evidence that Perez had been given a final warning in December 1996, shortly before the seasonal layoff. Thornton had warned Perez in December, prior to any union activity, that if Perez committed any violation of company rules, he would be terminated.

The evidence reveals that Perez was, in fact, discharged in December 1997. However, Thorton recommended, and Sasaki approved a change in the discipline to a final warning. Perez admitted that he had been warned that any further offense would result in his discharge.

The testimony of David Sasaki discloses that Respondent considered discharging Perez as a result of his conduct on October 10. Sasaki chose not to terminate Perez because Respondent was attempting to sell the business. Secondly, Perez had been a long time employee and a union observer. Sasaki reasoned that a discharge would provoke a lawsuit and he did not want a lawsuit with a sale of the business pending.

Documentary evidence shows that Respondent discharged nine employees for attendance problems in the 3 years prior to this case. Further, documentary evidence establishes numerous warnings were given to employees for attendance problems. The

[4] Marin had three earlier conversations regarding Perez' failure to show for work on time, without a prior phone call. First, the operator whom Perez was replacing complained to Marin that Perez was late. Second, Marin told Thorton that an operator was late, without calling, and Thorton told Marin not to let the employee work, if he did show up later that day. Marin could not remember whether Perez was mentioned by name in his conversation with Thorton. Third, Marin called the guard shack and advised security guard Joe Llanos not to allow Perez to enter the premises that day.

[5] Clark became involved in this disciplinary matter solely because Fabela was on vacation.

General Counsel was only able to establish, that in one instance, one employee had a worse attendance problem than Perez but was not suspended. When confronted with this evidence, Ramirez admitted that the other employee should have been suspended. Ramirez credibly testified that he must have overlooked the matter. The evidence did not establish that Respondent's treatment of Perez was harsher than its usual treatment of other employees or that Respondent deviated from its normal practices. If anything, Sasaki was reluctant to discipline Perez because Sasaki did not want a lawsuit during the period Respondent was attempting to sell the business.

D. Conclusions

1. The independent 8(a)(1) allegations

a. It is undisputed that in mid-June, John Leon, then Respondent's plant manager, spoke to a group of employees in Respondent's lunchroom. Leon declared that if Respondent "thought that the Union was going to come in, Respondent could do just about anything to prevent the union from coming in." Leon said Respondent could lay off employees without notice and could lower employees' wages to the minimum wage. Further, Leon stated that Respondent could even close the Company to keep the Union out. During this conversation, employee Eric Guerra raised the subject of a written warning that he had received. Leon asked Bob Skinner, a supervisor in charge of waste water, to retrieve Guerra's written warning and stated that he (Leon) would be willing to tear up the warning. Skinner returned with a document and Leon asked whether Guerra wanted Leon to tear up the warning. Guerra said, "no, that's not the point." Leon asked if the employees wanted a meeting with management "to get these problems worked out." Leon's threats of lower wages, layoffs or plant closure clearly tend to restrain and coerce employees in the exercise of their Section 7 rights. *Williamhouse of California,* 317 NLRB 699, 712–713 (1995); *Flexsteel Industries*, 311 NLRB 257, 268–269 (1993); and *Teskid Aluminum Foundry*, 311 NLRB 711, 716–717 (1993).

b. The General Counsel, in his posthearing brief, seeks to amend the complaint to allege unlawful interrogations in Respondent's questions of employees regarding the union activities of John Leon, a statutory supervisor. Contrary to the argument of the General Counsel, the issue was not fully litigated at the hearing. To determine such an issue when it is raised for the first time as a posthearing theory would place an undue burden on Respondent and deprive it of an opportunity to present an adequate defense. *Electrical Workers Local 1547 (Redi Electric),* 300 NLRB 604 (1990); and *Camay Drilling Co.,* 254 NLRB 239 (1980).

c. The General Counsel contends that by telling the employees that he wanted to know what their problems were and, thereafter, promising to speak with Respondent's management to do his best to see that the problems were resolved, Ybarra solicited grievances and promised to resolve them in violation of Section 8(a)(1) of the Act. It is well established that when an employer institutes a new practice of soliciting employee grievances during a union organizational campaign, "there is a compelling inference that he is implicitly promising to correct those inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992); and *Reliance Electric Co*., 191 NLRB 44, 46 (1971). Here, Respondent with knowledge that employees had worn union insignia, hired Ybarra to take a proactive stance. Ybarra asked employees to express their work problems and concerns. However, he went further and promised to speak with Respondent's management and do his best to resolve such problems. I find that by such conduct Respondent, through its labor consultant unlawfully made implied promises in violation of Section 8(a)(1) of the Act.

d. The General Counsel contends that Ybarra violated Section 8(a)(1) of the Act by telling an unidentified employee that a previously promised raise could not be granted because the representation petition had been filed. Ybarra testified that in early-August, he had a conversation with an unidentified employee in which they discussed the employee's complaint about not receiving a wage increase. The employee told Ybarra that he had been promised a raise several months before this discussion. According to Ybarra, he told the employee, "now that there is union activity, the Employer cannot discuss this type of thing." Ybarra told the employee that he would convey the complaint to Thorton. A few days later Ybarra told the employee that Thornton had said he couldn't do anything because the petition for the election was pending.

In deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. *Centre Engineering*, 253 NLRB 419, 421 (1980). The Board does not automatically find the granting of benefits during an organizational campaign to be unlawful, but it presumes that such action will be objectionable "unless the Employer establishes that the timing of the action was governed by factors other than the pendency of the election." *American Sunroof Corp.,* 248 NLRB 748 (1980); and *Honolulu Sporting Goods*, 239 NLRB 1277 (1979). However, the withholding of new benefits from employees who are awaiting a Board election also violates the Act if the employees otherwise would have been granted the increases in the normal course of the employer's business. *Progressive Supermarkets*, 259 NLRB 512 (1981). An employer is obligated to give any increase or benefit decided upon, or any regular, normal increase that would come due during the critical period, but should not put into effect any increase not already decided on before the union came on the scene.

The more prudent course, the one least likely to result in a violation, is to refrain from giving the wage increases during the critical period, for at the very least the General Counsel would have the burden of showing the normalcy of the increase, or that it had been decided on prior to the advent of the union. *Liberty Telephone Communications*, 204 NLRB 317, 322 (1973). Where employees are told *expected* benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference, the Board will not find a violation. *Truss-Span Co.*, 236 NLRB 50 (1978). However, if an employer withholds wage increases or accrued benefits because of union activities, and so advises employees, it violates the Act. *Liberty House Nursing Home*, 236 NLRB 50 (1978).

Applying these principles to the facts of the instant case, the testimony of Ybarra indicates that the unidentified employee had been promised a wage increase prior to the filing of the petition. By telling the employee that Respondent couldn't do anything

because the petition was pending, Ybarra was telling the employee that Respondent was withholding a wage increase and blaming that loss of benefit on the Union's filing of the petition. Ybarra gave the employee no assurance that the increase would be given after the election was over. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

e. On or about July 17, Sasaki thanked employee Steve Dayton for giving a statement regarding the recently discharged plant manager, John Leon. Sasaki told Dayton that he had heard Dayton was upset about not getting a raise. Sasaki admitted that a number of lab technicians had "slipped through the cracks" and had not received any pay increases recently. Sasaki said he would review Dayton's personnel file. However, Sasaki made it clear that he was not promising an increase for Dayton or anyone else. Shortly thereafter, Respondent received the representation petition and Sasaki did not review the personnel files of the lab technicians. I find insufficient evidence that Sasaki threatened reprisals if the Union were successful in organizing the employees and find no promise of a wage increase in order to induce abandonment of the union organizing activities.

f. In mid-August, Ybarra told Perez that the employees did not need the Union and that Ybarra could help the employees resolve their problems without the Union. Ybarra asked Perez if he had any problems he wished to discuss and Perez answered that he had received "bogus" warnings. Ybarra promised to look at the warnings with management and see if he could "fix" the problems. Ybarra remarked that he had learned from Ramirez that Perez had influence with the other employees and that employees would listen to Perez. Ybarra then asked Perez to try and convince other employees "that the Union was not the answer." On September 2, Ybarra again asked Perez to talk to employees about the election scheduled for the following day. Perez said he would try to do so.

I find that Ybarra impliedly promised to "fix" Perez' warnings in return for the employees' assistance in campaigning against the Union. Further, Ybarra gave Perez no assurances that the employee could refuse Respondent's requests for assistance. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act. *Reno Hilton*, 320 NLRB 197, 207 (1995); and *Foamex*, 315 NLRB 858 (1994).

2. The suspension

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or (1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

For the following reasons, I find that the General Counsel has not even made a prima facie showing that Respondent suspended Perez in violation of Section 8(a)(3). The General Counsel has established that Respondent, through its supervisors had knowledge of Perez' union activities. On September 4, Perez acted as an observer for the Union even after Ybarra had asked him, on two occasions, to talk to other employees in order to obtain support for the Employer. However, this is not enough to establish a prima facie case.

Prior to any union activity, Perez had been given a final warning. In December 1996, Respondent was prepared to discharge Perez but reduced the discipline to a final warning. Perez was clearly notified that any further infraction would result in his termination. Whilethe General Counsel argues that Perez had no warnings in 1997, that fact is insignificant. Because this is a seasonal business, Perez was not at work during the first 5 months of 1997. Thus, he had worked less than 4 months before he was again late for work in September. However, due to the fact that the election had just been held, no discipline was taken against Perez. When Perez was late for work on October 10, without a call, he told Marin that he had overslept and told Llanos and Garcia that he had car trouble. Thus, in Respondent's view, Perez was late without an excuse and had lied about it.

It is undisputed that Perez placed his employment in jeopardy in December 1996, prior to any union activity. Notwithstanding Perez' prior disciplinary record, and his tardiness on September 9 and October 10, Respondent did not discharge Perez. Rather, because Sasaki is a cautious man, Respondent merely suspended Perez, resulting in only a loss of 2 days' pay. I find Respondent's actions are not discriminatory and are fully consistent with the December warning and legitimate business reasons. Respondent has a practice of disciplining and discharging employees for attendance problems. The evidence that one employee had a worse record than Perez but was not suspended, is not convincing in light of the entire record. I accept Tim Ramirez' testimony that he made a mistake by not taking stronger action against the other employee.

In sum, I find that the suspension of Perez was motivated by legitimate business reasons and did not violate Section 8(a)(3) and (1) of the Act. Even had I found that the General Counsel established a prima facie case that the suspension was motivated by Perez' union activities, I would find no violation of the Act based on my finding that the discipline would have occurred in any event because of Perez' final warning in December 1996 and the lateness which occurred in September and October 1997.

3. The representation proceeding

Having concluded that Respondent, between the date of the petition and the date of the election, solicited employee grievances and impliedly promised to remedy employee grievances, and promised to "fix" disciplinary warnings to obtain employee assistance in campaigning against the Union, I find that Respondent's acts constitute objectionable conduct which interfered with the free choice of employees in the election. Such conduct constitutes grounds for setting aside the election. *American Safety*

Equipment, 234 NLRB 501 (1978); and *Dayton Tire & Rubber*, 234 NLRB 504 (1978). I, therefore, recommend that the election be set aside.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by threatening wage decreases, plant closure, and other reprisals in order to defeat the union campaign.
4. Respondent violated Section 8(a)(1) of the Act by soliciting grievances and promising to rectify those grievances, promising benefits in exchange for employee assistance in campaigning against the Union, and by telling an employee that a previously scheduled wage increase would be withheld because the employees had engaged in union activities.
5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. By the conduct set forth in Conclusion of Law 4, above, Respondent has illegally interfered with the representation election conducted by the Board in Case 32–RC–4332.

Based on the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Met West Agribusiness, Inc., and its successor Sun Met Agricultural, Inc., their officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Soliciting grievances from employees and impliedly promising to rectify them in order to cause employees to become disaffected with the Union.

(b) Promising employees benefits in exchange for employee assistance in campaigning against the Union.

(c) Threatening employees with wage decreases, layoffs, plant closure, or other reprisals in order to discourage union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Regional Director, post at its Del Rey, California facilities copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by authorized representative of Respondent, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since June 15, 1997.

(b) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official of Respondent on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the Regional Director for Region 32 shall set aside the representation election in Case 32–RC–4332.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit grievances from employees and impliedly promise to rectify them in order to cause employees to become disaffected with Distillery, Wine & Allied Workers Division, Local 45D, United Food and Commercial Workers International Union, AFL–CIO, CLC.

WE WILL NOT promise to remedy employee grievances or promise other benefits in exchange for employee assistance in campaigning against the Union.

[6] All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

WE WILL NOT threaten employees with lower wages, layoffs, plant closures or other reprisals in order to discourage union membership or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of any rights guaranteed by Section 7 of the Act.

MET WEST AGRIBUSINESS, INC.